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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	x	**Chapter 11**
NORTHWEST AIRLINES CORPORATION, et al.,	:	**Case No. 05-17930 (ALG)**
Debtors.	:	**Jointly Administered**
--	:	
CAPP SEVILLE, INC.,	:	
Plaintiff-Counterclaim-Defendant	:	**Adv. Pro. No. 06-01446**
v.	:	
NORTHWEST AIRLINES, INC.,	:	
Defendant-Counterclaim-Plaintiff	:	
--	:	
NORTHWEST AIRLINES INC.,	:	
Third Party Plaintiff,	:	
v.	:	
LARKEN, INC.,	:	
Third Party Defendant	x	

DESIGNATION OF ADDITIONAL ITEMS
TO BE INCLUDED IN RECORD ON APPEAL

Pursuant to Bankruptcy Rule 8006, Appellee Capp Seville, Inc. ("Capp") hereby submits its designation of additional items to be included in the record on appeal of the Bankruptcy Court's April 11, 2008 Order denying Northwest Airlines, Inc.'s ("Northwest") Motion for Summary Judgment on the Issue of Plaintiff Capp Seville, Inc.'s Liability for Breach of Contract and Granting Capp's Cross-Motion for Summary Judgment as to All Issues Raised Against it by Northwest in its Counterclaim.

DESIGNATION OF ADDITIONAL ITEMS TO BE
INCLUDED IN RECORD ON APPEAL

1. Transcript from the October 30, 2007 hearing on Northwest's Motion for Summary Judgment on the Issue of Plaintiff Capp Seville, Inc.'s Liability for Breach of Contract and Capp's Cross-Motion for Summary Judgment as to All Issues Raised Against It by Northwest in Its Counterclaim. This transcript was previously requested and a certified copy is attached hereto as Exhibit A.

Dated: May 9, 2008

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 9, 2008, he caused a true and correct copy of the DESIGNATION OF ADDITIONAL ITEMS TO BE INCLUDED IN RECORD ON APPEAL to be served via U.S. mail, on the following individuals:

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Dated: May 9, 2008

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	. Chapter 11
	. Case No. 05-17930 (ALG)
NORTHWEST AIRLINES CORPORATION, et al,	. (Jointly Administered)
	. New York, New York
Reorganized Debtors.	. Tuesday, October 30, 2007
	. 9:08 a.m.
CAPP SEVILLE, INC.,	. Adv. Proc. 06-01446 (ALG)
vs.	.
NORTHWEST AIRLINES, INC.	.

TRANSCRIPT OF REORGANIZED DEBTORS' TIER III(B) OBJECTION
DEBTORS' TWENTY-FIFTH OMNIBUS (TIER II) OBJECTION
MOTION FOR SUMMARY JUDGMENT IN ADVERSARY PROCEEDING
BEFORE THE HONORABLE ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: J. David Leamon, Esq.
CADWALADER, WICKERSHAM & TAFT, LLP
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(Appearances continued)

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For the Post-Effective Date Committee:	Jordan A. Wishnew, Esq. OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C. 250 Park Avenue New York, New York 10169
For Penta Aviation:	Thomas G. Macauley, Esq. ZUCKERMAN SPAEDER, LLP 919 Market Street, Suite 990 Wilmington, Delaware 19899
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For the John Hancock Entities and Wells Fargo as Indenture Trustee:	David S. Cohen, Esq. MILBANK, TWEED, HADLEY & MC CLOY, LLP International Square Building 1850 K Street, NW Washington, D.C. 20006
For Wilmington Trust Company as Owner Trustee: (Via Telephone)	Stephen M. Miller, Esq. MORRIS JAMES, LLP 500 Delaware Avenue, Suite 1500 Wilmington, Delaware 19899
Pro Se Claimant:	Sam Griffiths.

INDEX

(Proceedings commence at 11:53 a.m.)

THE COURT: We need to get some people on the phone.

(Court and court personnel confer.)

THE COURT: Anyone who has not given their card or their appearance to the reporter, who is going to speak, is asked to please do so.

(Conference call established.)

THE CLERK: This is Judge Gropper's courtroom.

THE COURT: Good afternoon. This is Judge Gropper. I'll take appearances from those in the courtroom first, and then from those on the telephone.

From the court.

MR. LEAMON: Good morning, Your Honor. David Leamon, Cadwalader, Wickersham & Taft, for the debtors and reorganized debtors Northwest Airlines, Inc.

THE COURT: I stand corrected. All right. Who else for the debtors?

MR. EYRES: Good morning, Your Honor. Jeff Eyres, Leonard, Street & Deinard appearing on behalf of the debtor Northwest Airlines with respect to the Capp Seville matter.

MR. GOROFF: Good morning, Your Honor. David Goroff, Foley & Lardner, on behalf of Capp Seville.

MR. WISHNEW: Good morning, Your Honor. Jordan Wishnew, Otterbourg, Steindler, Houston & Rosen, for the Post-Effective Date Committee.

THE COURT: Anyone else appearing? Mr. Griffiths. Are you Mr. Griffiths?

MR. GRIFFITHS: Here.

THE COURT: All right. Just state your name.

MR. GRIFFITHS: Sam Griffiths, claimant.

THE COURT: You're a claimant individually?

MR. GRIFFITHS: Yes.

THE COURT: And you don't have a lawyer.

MR. GRIFFITHS: No.

THE COURT: Is that right? All right. I tried to reach you by telephone to say that you didn't have to come all the way to New York, but you're here, and if you just sit down --

MR. GRIFFITHS: All right.

THE COURT: -- we'll take certain uncontested -- no, stay up front; you can stay at the desk or at the chair right behind you -- we'll take certain uncontested matters first, then we'll take your matter, Mr. Griffiths.

Yes.

MR. COHEN: Good morning, Your Honor. David Cohen, Milbank, Tweed, Hadley & McCloy, here on behalf of the John Hancock entities, and Wells Fargo as Indenture Trustee, on the twenty-fifth omnibus objection.

THE COURT: All right.

MR. MACAULEY: Good morning, Your Honor. Thomas

Macauley on behalf of Penta Aviation on that same matter.

THE COURT: All right. Anyone else in the courtroom?

(No verbal response.)

THE COURT: All right. On the telephone, please. Is somebody on the phone?

MR. MILLER: Good morning, Your Honor. Good morning, Your Honor. Stephen Miller of Morris James, LLP, on behalf of Wilmington Trust Company as Owner Trustee.

THE COURT: Anyone else on the phone, individual or lawyer?

MR. HOROWITZ: Leonard Horowitz with Capp Seville in Minneapolis.

THE COURT: All right. Anyone else?

(No verbal response.)

THE COURT: Very good. Let's proceed.

MR. LEAMON: Good afternoon, Your Honor. David Leamon, Cadwalader, Wickersham & Taft, for Northwest.

There are no uncontested matters on the agenda for today, although there are a few adjourned matters, if you want me to --

THE COURT: All right. Why don't you state what's being adjourned.

MR. LEAMON: Yes, Your Honor.

The first adjourned matter is the debtors' twenty-fifth omnibus Tier II objection, solely as it relates to three

proofs of claim filed by the City of Los Angeles, Claim Nos. 979, 6307, and 12364. That matter is being adjourned until November 14th, 2007, at 11 a.m.

The second matter is the notice -- I'm sorry -- the adjournment of the application of Federal Express Corporation for an administrative expense priority claim. That is being -- the debtors have until early May of next year, Your Honor, to object to administrative expense claims, so this is going to be tabled until the debtors continue to review the claim and decide how they want to proceed with that.

THE COURT: How many administrative expense claims are up in the air?

MR. LEAMON: Your Honor, it's a small number; I would say probably less than about eight or ten that I'm aware of that we're currently actively reviewing.

THE COURT: I think the debtors would be ill-advised to take all of that time to resolve these claims, so maybe the next time you can give me a report.

MR. LEAMON: Yes, Your Honor.

THE COURT: Because very often plans have very lengthy times for these things to be objected to; and while that may be a safety valve, it may not be fair to push these off quite that far.

MR. LEAMON: Yes, Your Honor, we will --

THE COURT: But that's for another day.

MR. LEAMON: Yes, Your Honor. We'll provide that to you at the next hearing, which is scheduled for November 9th at 11 a.m.

THE COURT: Okay.

MR. LEAMON: Your Honor, that does it for the adjourned matters.

THE COURT: All right.

MR. LEAMON: We've got -- for contested matters, we have the reorganized debtors' Tier III objection to Mr. Sam Griffiths -- two claims filed by Mr. Griffiths, a pre-petition and an administrative expense claim, for a claim that is asserting post-petition amounts.

THE COURT: All right.

MR. LEAMON: We also have, continued from the previously hearing, Your Honor, I believe on September 25th, the debtors' twenty-fifth omnibus objection with respect to Claim No. 7237, the Wilmington Trust/Penta matter. That will be going forward.

And then we have the motion of Josue Payes, Royal Airline Linen of New York, for relief from the stay. That hearing will go forward, Your Honor.

And we also have, of course, the adversary proceeding; the Capp Seville adversary, which will be going forward with respect to the two cross-motions for summary judgment.

THE COURT: All right. Where shall we start; shall we

start with Mr. Griffiths' claim?

MR. LEAMON: Yes, Your Honor.

Your Honor, as you know, this is a Tier III objection. The two proofs of claim filed by Mr. Sam Griffiths; Claim No. 9604, pursuant to approximately $2.1 million relating to certain discrimination claims that he had filed in state court and were removed to federal court back in 1999, 2000. His claims were dismissed based on Northwest's motion to have those claims arbitrated. It's Northwest's position that Mr. Griffiths, thereafter, effectively sat on his rights and did not pursue those claims.

We object to that claim, 9604, Your Honor, on two grounds:

The first being that when the claims were filed in state court, the claims arising out of Minnesota state law were time-barred when filed. The Minnesota statute requires that Mr. Griffiths had filed his claims in a court of law within forty-five days of having received a notice, right-to-sue letter from the Minnesota Department of Human Rights. Mr. Griffiths waited approximately, I believe 137 days, Your Honor, to file that to commence that action.

With respect to the Title VII federal discrimination claims, Your Honor, the lawsuit filed by Mr. Griffiths was filed on approximately the eighty-ninth day of the ninety-day statute of limitations. However, under the cases that we cite

in the objection, the statute of limitations was not tolled during the pendency of that case; and that, upon dismissal, the claims were either, at that time, time-barred, or certainly -- and even if you reset the statute for a full ninety days, it became time-barred as a result of Mr. Griffiths' inaction.

Therefore, we're asking the Court to disallow those claims, first on the grounds that they are time-barred; and second on the doctrine of laches, based on the inordinate and inexcusable delay of Mr. Griffiths to prosecute these claims --

THE COURT: Now the decision of Judge Magnuson of the U.S. District Court, dated March 31, 2000, is attached to your papers.

MR. LEAMON: Yes, Your Honor.

THE COURT: That says:

"The defendant's motion to compel arbitration and to stay or dismiss is granted, and the case is dismissed without prejudice.

MR. LEAMON: Yes, Your Honor.

THE COURT: [quoting] ...

"Any further prosecution of the claims in plaintiff's complaint must be pursued through binding arbitration."

MR. LEAMON: Yes, Your Honor.

THE COURT: All right. So I know you're making the argument that arbitration has been, in effect, forfeited

because of laches. But why isn't that a question for the arbitrator?

MR. LEAMON: Your Honor, it's Northwest's position that Your Honor has jurisdiction to decide these claims, and that, while an arbitrator certainly could do so, there is no controlling authority that mandates that an arbitrator make that decision.

THE COURT: Well, there's lots of authority -- it's growing -- that if a matter is either core or non-core, except in extreme circumstances such as the U.S. Lines case, arbitration should be respected in bankruptcy proceedings and shouldn't be interfered with. And you certainly can't argue that this is an extreme case; this is one claimant out of many thousands.

MR. LEAMON: Yes, Your Honor, you're correct. However, I would think that, when taken holistically, that arbitration would prejudice Northwest even more. The Court --

THE COURT: Sounds to me like that's an argument that might win before the arbitrator, or might not; but it sounds to me like that's a good argument for the arbitrator, but that I'm not necessarily the right person to decide it.

MR. LEAMON: Yes, Your Honor. We're aware of the authority that Your Honor cites. And you know, our only position would be that, to the extent that Your Honor does have jurisdiction, we would ask that the Court exercise that

jurisdiction.

THE COURT: Has there been, to your knowledge, any development on the law that would call mister -- excuse me -- Judge Magnuson's decision sending this to arbitration into question?

MR. LEAMON: Not per se, Your Honor, just that the circumstances under which that decision was rendered was certainly outside of bankruptcy, that there --

THE COURT: That was years ago.

MR. LEAMON: It was years ago, Your Honor. And that, as waning as it might be, that there does still exist some authority under which this Court would be justified in exercising -- retaining jurisdiction and exercising that jurisdiction to resolve these claims. Certainly it's at Your Honor's discretion, but that would be what the debtors would request.

THE COURT: Well, the claim has to be resolved. I mean, there is a claim. Debtor is in bankruptcy. You want to get out of bankruptcy. Although you've already mentioned a May date, hopefully we'll get all of the claims resolved sooner, rather than later. So there has to be some deadline here --

MR. LEAMON: Yes, Your Honor.

THE COURT: -- so that you don't have to reserve for this claim forever.

MR. LEAMON: Absolutely, Your Honor. And we would ask

that that day be today, and the --

THE COURT: Well, I understand that. All right. Thank you.

MR. LEAMON: Yes, Your Honor. Thank you.

THE COURT: Mr. Griffiths. I've read your papers, and I understand your position.

MR. GRIFFITHS: Thank you, Your Honor.

THE COURT: And what I've suggested to the debtor is the following:

That your claims for damages against the debtors were incorporated in a lawsuit which was before Judge Magnuson in 2000, and he dismissed them on the ground that you should go to arbitration.

MR. GRIFFITHS: Yes.

THE COURT: And I have two questions; one is:

All right. The arbitration remedy, if it's still there, is what Judge Magnuson said should be done, and I don't necessarily have jurisdiction to review what he did.

Secondly, they will argue before the arbitrator that you waited too long, and that the whole thing is stale, and they've been damaged. But that's a question for the arbitrator.

And the third question that we'll come to, but you don't have to handle them all at once, is whether there shouldn't be some deadline because we do have a bankruptcy

here, they have a bunch of claims. Until they resolve your claim, they have to reserve for it, so you get your distribution of stock the same as every other creditors.

MR. GRIFFITHS: Yes, Your Honor.

I believe that I have been diligent in approaching this, my termination; that is, I started out by first hiring a lawyer to work with Northwest to resolve the situation, then following up with the Minnesota Department of Human Rights, then following up with the EEOC, and then filing a lawsuit; so that I think that shows diligence during that time period.

There is also a question of diligence after that time period. And though I showed one document that showed that there has been communication -- or there had been communication between Eric Nelson of the firm that represented Northwest at the time, there had been several communications on there.

I would also point out that the EEOC and the Minnesota Department of Human Rights were very clear in the deadlines for filing lawsuits: Forty-five days for the Minnesota Department of Human right; ninety days for the EEOC. Northwest never shared with its employees in any documentation that I have that there is a ninety-day limitation. The question of ninety-day limitation came up much later in the process. It would seem like the company would have a fiduciary responsibility to share that information and not hide it, or not give it to the prospective arbitrees.

As I -- and so those items says that I have been diligent, and it also says that -- I have documentation to show that I have made communications back in 2002 -- I'm sorry, in 2000 and after. I have envelopes that kept coming back because they were no longer looking at -- I assume they were no longer looking at my arbitration, so those mail came back unopened. So I have been diligent, and I do have actually mail back there that I could share, that I haven't presented previously. So for those things, I have been diligent.

And I believe that, one, with the record that I have in Northwest, the record is that I -- as an employee, I was an excellent employee per their own documentation. The things that I did above and beyond my work were exceptional; they added value to the company, millions of dollars.

You know, and looking at that growth, I also look at the person I thought instigated the problem, Andy Roberts, who has moved up very fast. In fact, he has been awarded $10 million in stock, as to keep individuals like that at the company. In my Minnesota Department of Human Rights, you can see Andy Roberts' name mentioned several times because, until Andy showed up, everything was flowing fine, my success rate was continuous. Andy spent a lot of time in my office doing things that were unreasonable, which I don't believe we should go into here, and may be not appropriate.

THE COURT: No, we shouldn't get into the merits

today.

MR. GRIFFITHS: Okay. Well, you know, the things that Andy did --

THE COURT: We should not get into the merits.

MR. GRIFFITHS: Oh, we should not get into the merits. Oh, then I will skip along there.

You know, and as I look at this, one thing that's very clear during bankruptcy, they could afford to settle it. Okay? That's clear. And my career has been damaged. I no longer have the respect of the industry.

When you leave the company like that, and my termination -- my termination letter does not specify why I am leaving, it -- I received it over Christmas, which is pretty painful, and they retroactively showed it as December 17th. And then I got my bank account, and they reversed all previous payments in December.

And you know, in addition -- yeah. You know, my wife tried to join Northwest because she missed the things that we did together. We got divorced.

THE COURT: Well --

MR. GRIFFITHS: That's pretty much my summary on this issue.

THE COURT: All right. Now there is a second claim in which you're seeking a small amount --

MR. GRIFFITHS: Yes.

THE COURT: -- for costs, postage, other expenses. Ordinarily, the costs that a creditor incurs in connection with filing a claim and similar activities is not a cost of administration of the estate. I gather that's the nature of your second small claim. Is that right?

MR. GRIFFITHS: It is, and --

THE COURT: Tell me --

MR. GRIFFITHS: And --

THE COURT: -- is it for anything other than responding to their motion?

MR. GRIFFITHS: No, it is not, and I would concede on that one, Your Honor. I don't believe -- I can concede on that number.

THE COURT: All right.

MR. GRIFFITHS: I would like -- I would like compensation for my trip to New York.

THE COURT: Well, it really follows the same principle.

MR. GRIFFITHS: Okay.

THE COURT: But what I'm going to do is -- and let me see whether the debtors has anything further to say.

MR. LEAMON: No, Your Honor.

THE COURT: All right.

MR. LEAMON: I was going to address the admin. claim, but Your Honor did that.

THE COURT: Judge Magnuson's decision is very clear that this matter should have gone to arbitration years ago. And under applicable authority, I think it should be arbitrated now. Now I don't know exactly what the procedures are because I think this was an internal form of arbitration within Northwest, but it should be followed to the extent it can be followed.

Northwest can argue to the arbitrator that they've been damaged by the delay, what they call "laches," l-a-c-h-e-s, it's a legal term for delay. And if they've been damaged, then they can claim it's too late. You can certainly argue to the contrary. And I would urge you, if you're serious about pursuing your claim, to consider retaining a lawyer who can represent you. On the other hand, arbitration is designed to be available to individuals without a lawyer.

That's neither here, nor there. That is for the parties to proceed. As I said, they can argue laches; you can certainly argue against it, and that you've been diligent, and that they haven't been damaged because they have employees who are presently on staff, who can respond to your complaint, or they can access the records and access former employees.

The only thing this Court will do is set a deadline for your proceeding with the arbitration, because while the arbitration proceeds, the debtor does have to reserve for your claim, and that prevents them from resolving all their claims

and distributing all of the stock that's being distributed to creditors.

So it seems to me that you should have a reasonable period to commence the arbitration, and then the arbitration can run its course, but that you should obviously be diligent in pursuing it. Would sixty days be a reasonable period for you to pursue the arbitration by sending a letter to Northwest -- and counsel will give you his name -- demanding that these matters be arbitrated, setting forth your claims and asking that a date be set at a convenient location for the arbitration?

MR. GRIFFITHS: Yes, Your Honor.

THE COURT: All right. And the arbitration, I understand, is pursuant not to the procedures of the American Arbitration Association, but to some individualized procedures. Is that right?

MR. LEAMON: Yes, Your Honor.

THE COURT: As far as you know?

MR. LEAMON: Yes, Your Honor.

THE COURT: All right. Well, let's say -- I'll ask the debtors then to settle on you, show you, and then send to me an order providing that you'll have sixty days to commence arbitration and proceed then diligently with arbitration; and that all parties' rights before the arbitrator are reserved, in terms of arguing delay and the like.

You can also argue to the arbitrator that you should get the costs, additional costs. But I think, in the mean time, we'll have to eliminate your second proof of claim; that is, for administrative claims against the estate.

MR. GRIFFITHS: Thank you, Your Honor.

THE COURT: All right. Thank you.

Next matter? Shall we do the -- what is the motion for relief from the stay? Whose matter is that? I thought you mentioned that --

MR. LEAMON: It was on the agenda, Your Honor. I guess perhaps that party is not --

THE COURT: I didn't see it. Is there a motion -- is anyone here to argue a motion for relief from the stay?

(No verbal response.)

THE COURT: All right. That's easy. I had a Tower motion for relief from the stay that -- in Tower Automotive, another case altogether. So it may be that chambers called you about it, thinking it was a Northwest matter, rather than a Tower matter. All right.

MR. LEAMON: Yes, Your Honor. In that case --

THE COURT: That one we've been most successful on.

MR. LEAMON: Yes, Your Honor.

THE COURT: And in record time.

(Laughter.)

THE COURT: Judging by the amount of material I have

on Capp Seville, we'll be here for the next two weeks, so maybe we should take Wilmington Trust first.

MR. LEAMON: Yes, Your Honor. I believe the debtor, as stated in the November 25th hearing [sic], we don't really have an active position in the carried-over --

THE COURT: You don't have a dog in this fight.

MR. LEAMON: Exactly, Your Honor. So I will turn the podium over to --

THE COURT: Well, you just don't want a duplicative claim.

MR. LEAMON: Yes, Your Honor.

MR. COHEN: Good afternoon, Your Honor. David Cohen with Milbank Tweed, here on behalf of the Hancock entities and Wells Fargo.

As the Court may recall, the issue between Penta and Hancock with respect to the debtors' twenty-fifth omnibus objection is whether the debtor owns the rejection -- or rather, Penta owns the rejection claim, or Hancock does. And I'd like to give you a report of where we are and where we aren't from the last hearing.

THE COURT: I'd much rather here where you are, rather than where you aren't.

MR. COHEN: Then that's where I'll start.

We have given Penta --

THE COURT: Let me -- Mr. Griffiths, you can stay; or,

if not, counsel -- do you have counsel's card so you know who to communicate with?

MR. GRIFFITHS: No, I don't.

THE COURT: And you certainly don't have to stay for the rest if you don't want to.

All right. Please go ahead.

MR. COHEN: We have given Penta the accounting, as the Court instructed us to do at the last hearing. We've also given Penta the subsequent bill of sale. Those documents are confidential. We're going to file a motion this afternoon to file them with the Court under seal, and then we'll have those with the Court.

What the document, the accounting in particular, does confirm is that there is equity in the claim, so that the amount of the rejection damages claim is in excess of the debt, which we believe Hancock is entitled to be paid under the operative documents.

We have a little bit of a disagreement on the accounting that we're working out with Penta, and I think we can reach agreement as to what the accounting is going to be, and we'll file the bill of sale to the subsequent purchaser with the Court this afternoon.

So what it leaves us with is, I think, where the Court was at the last hearing, is the legal issue as to whether and when the lease was terminated. And I think that there needs to

be a little bit of discovery there; very limited factual discovery, because there was a subsequent proceeding, there were FAA rejection notices that were filed by separate counsel. The subsequent purchaser, Northwest, and Wilmington signed certain documents.

We've had conversations with Penta over the last month, trying to avoid discovery and reach a consensual resolution. We're not there, and we may not be able to get there. But I don't think that, without the evidentiary record, that the issue is ripe for adjudication today. So maybe a short adjournment to the next hearing. We can either do the discovery or reach the consensual resolution. You know, we could come back in a month and have an evidentiary hearing on the termination issue, or maybe the whole thing could go away.

THE COURT: Tell me how the termination issue affects the result. It affects your argument that you bought the rejection claim at the foreclosure sale. Is that the intersection?

MR. COHEN: That is the intersection. And what Penta has argued is that the lease terminated either with the debtors' filing of the motion for authority to reject the lease shortly after it filed for Chapter 11 protection, or that the lease was terminated when the notice of acceleration was issued approximately six weeks before the foreclosure sale.

We have other dates which we believe establish that,

at the foreclosure sale and at the time of the execution of the bill of sale, the lease was still in effect based on some of the actions Penta took, some of the representations, and some of the filings. And I think what we would need to do is very limited discovery as to why those positions were taken after the foreclosure sale, if it was Penta's position that the lease had already terminated.

THE COURT: And they could take discovery on the question of the notice provided to the world of exactly what was being sold and what you thought you were selling when you wrote the foreclosure documents that you did.

MR. COHEN: Certainly. Discovery, I think, always has to be two-sided, and if they wanted --

THE COURT: I'm not suggesting that that's the way to go, necessarily.

MR. COHEN: If they wanted that discovery --

THE COURT: They may not be -- they may not wish to pursue the issue any more than the papers say what they say. I don't --

MR. COHEN: I thought --

THE COURT: I didn't mean to suggest that there should be further discovery on either side, but ... all right.

MR. COHEN: I thought the Court was fairly clear on what the notices provided and didn't.

THE COURT: I read them, and they are what they are,

which leads to the question as to what information the additional discovery could demonstrate.

MR. COHEN: What they could demonstrate is what -- whether the lease was in effect.

It's Penta's argument, essentially, that because the lease was terminated prior to foreclosure -- as I understand the argument -- it couldn't have been sold at foreclosure in any event because it was a terminated lease; and even if it -- and even going forward, when Penta -- or Wilmington Trust, rather, executed the bill of sale conveying all of its right, title, and interest, it couldn't have conveyed right, title, and interest under the lease because it was terminated. So I think it goes --

THE COURT: Then their final argument is that, even if it hadn't been terminated, and even if there were rejection damages that could have been sold at a foreclosure sale, that they weren't because your notice didn't state clearly enough that they were being sold, and that the -- and that the sale was an, if you will, all-or-nothing proposition.

MR. COHEN: Correct. That subsequent to the foreclosure sale, they executed a bill of sale that conveyed all right, title, and interest. And it would be our position that included the rejection, whether or not the notice of foreclosure and what was actually bid on at the foreclosure.

And I think when the Court sees the accounting, one of

the concerns that the Court had when we were here a month ago was: Did the credit bid in any way reflect the market value of the aircraft, and were those two things somehow related? And I think when we provide the Court with the accounting this afternoon -- and I don't think either Penta -- I don't know that Wilmington Trust has the accounting, but Penta is the beneficial interest here. Penta disputes that the amount paid by Hancock at the foreclosure and the subsequent sale reflects that the bid at foreclosure was consistent with the market value of the plane, which was the Court's other question the last time we were here.

THE COURT: All right.

MR. COHEN: Thank you, Your Honor.

THE COURT: Thank you.

MR. MACAULEY: Good morning, Your Honor. Thomas Macauley for Penta.

Your Honor, Mr. Cohen and I had spoken about the last hearing, and it's our understanding that the Court decided the notice issue and said clearly that there was no notice with respect to the foreclosure; but that the Court left open the issue with respect to whether, by operation of law, the bill of sale somehow conveyed the lease rejection claim in connection with the public sale.

Our argument at the time was that the Court on this record could decide that issue. There were some state court

cases that John Hancock had cited that there was a -- that the -- you know, the sale of the aircraft includes the lease, as well. Our argument is that the lease terminated well beforehand, and that those cases are simply inapplicable for that reason.

Now we had argued there were two reasons, as Mr. Cohen had alluded to, why the lease terminated prior to the sale:

First, the aircraft was subject -- the aircraft lease was subject to a rejection motion filed on the first day. This was the aircraft that was -- the air frame was in Mobile, and the engines were in Arizona. And so the Court -- the debtor dropped it like a hot potato. And our argument was that, well, the order -- the order rejecting the lease not only rejected the lease, but allowed the debtor to abandon the aircraft. And by the fact of rejection, plus abandonment, we view it as sufficient to cancel or terminate the lease.

The other issue we raised was that on January 31st of 2006, approximately -- a little over thirty days before the public sale, the indenture trustee sent a notice of acceleration, which we discussed at length at the September 25th hearing. And in that notice of acceleration the indenture trustee specifically states that the indenture trustee, quote, "hereby terminates the lease."

And so while I understand there may be an interest in discovery from John Hancock's part, we believe that the issue

on whether, by operation of law, the lease claim goes with the aircraft sale is -- the record is sufficient for the Court to decide that issue at this point.

I will say the subsequent bill of sale, which was produced to us, does have the exact same language as the bill of sale that Wilmington Trust executed in favor of the indenture trustee. So the same language that they are arguing operates as an operation of law, they used for a bill of sale that happened approximately twenty days later.

Finally, the argument that they raise with respect to our proof of claim I want to address. With respect to the -- we had a proof of claim or a rejection of proof of claim, provided for up through the sale of the aircraft. And John Hancock says, well, you're arguing that you're seeking unpaid rent through the sale of the aircraft, so you're effectively admitting or suggesting that the lease was still in existence.

I would submit, Your Honor, that there is a difference between a remedy versus the actual executory obligations that operate under a lease. As the UCC indicates -- and I would cite Article 2A, Section 505. Cancellation of a lease discharges the executory obligations on the lease, but it does not cut off the remedy. And I think it's pretty clear under -- I think it's -- the law is pretty clear that if a lessor has a claim for rejection damages or breach of contract under a lease, and then goes to sell the goods or the property or

whatnot, that the lessor cannot submit a claim for future rent beyond the sale because the lessor doesn't own the property anymore. That's, I think, pretty simple. But the fact that the lease terminated before the sale doesn't cut off the lessor's claim, and I think the UCC is pretty clear on that, as well.

The UCC also states, as a measure of damages -- and I would cite Article 2A, Section 527 -- that the lessor, as part of its measure of damages, can sell the goods, but keeps the claim for damages. It doesn't automatically lose the claim for damages by selling the goods.

So we would submit that -- Your Honor, that the record is sufficient in view of, I think, the stipulation, A, that there is equity in the claim beyond the -- beyond the amount that the debt is claiming, in view of the current stock price that Northwest is trading at; and also, that the bills of sale are a mirror image of each other between the bill of sale with respect to the foreclosure sale, and then with respect to the subsequent sale.

And I don't know if there are any other pieces of the record that Your Honor would view as necessary --

THE COURT: Well, how do you propose we proceed from here? They want to take, they say, limited discovery, and then I'm not sure exactly what happens next, other than perhaps to submit the matter to me for decision.

MR. MACAULEY: Well, I mean, one concern, Your Honor, is that -- and I will say -- I will tell you, one issue that we are going to have with the accounting is that there's a -- you know, there's a large chunk of it for attorneys' fees. And under the indenture, the owner trustee is responsible for reasonable attorneys' fees. And we don't necessarily think that the argument that they tried to foreclose on this lease claim is reasonable, and we're going to have an issue with that.

So I hate to sort of go down a road of discovery, which I don't think is necessary because our arguments, both with respect to the debtors' actions to terminate the lease and then the indenture trustee's action to terminate the lease, those are dispositive. And so you would only get to a discovery issue rased by John Hancock if you were to rule no on both of those. And so I would submit that the issue is ripe for decision at this point.

THE COURT: All right.

MR. MACAULEY: Thank you, Your Honor.

THE COURT: How do I get to that happy day?

MR. MACAULEY: Well, you have --

THE COURT: Let me make a suggestion.

MR. MACAULEY: Absolutely.

THE COURT: Mr. Cohen suggested that additional papers be filed this afternoon. I don't think I need them this

afternoon.

Why don't I ask the parties to stipulate to what they can; to all of the facts and, if you can, the documents that you believe are needed to resolve any open items; and that we have a reasonable time to get as far as you can. That should clarify exactly what facts can't be stipulated to, if any. You can have a reasonable time for discovery, if you need it, keeping in mind that it's expensive and may be, at the end of the day, self-defeating.

And then if there are any open issues, I should also be informed of how long I need a hearing to resolve them. From what you've said, there shouldn't be any, in terms of your argument. I don't know whether Mr. Cohen will have any or not. And I don't know what that period of time should be, but -- and I'm not sure we need another hearing. Maybe I just need the issue submitted to me for a decision. But I'll certainly have another hearing if the parties think it would be useful.

MR. MACAULEY: Your Honor, the way that you had left it at the last hearing, as you had said on the record, you were going to go back and look at some decisions that John Hancock had cited, and that you were looking for these additional pieces of evidence that John Hancock is ready to submit into the record, albeit under seal or --

THE COURT: All right. I think you should just sign a stock confidentiality agreement, and we'll keep the documents

confidential, although for what purpose, I don't know, but that doesn't matter.

MR. MACAULEY: Yeah. This was just raised to me this morning --

THE COURT: It doesn't matter.

MR. MACAULEY: -- and we don't have a problem, you know, with that prospect, so ...

THE COURT: All right. Let me hear from Milbank.

MR. COHEN: Just a couple of points in response to Mr. Macauley's comments, Your Honor.

First, on the notion that the debtors' rejection motion somehow terminated that lease, I think we dealt with that issue in our August 10th brief at Page 4, and I won't reargue that here.

As to the idea that the aircraft were abandoned, there's no evidence in the record on that point. But I think that the rejection motion and the cases are pretty clear it does not, in and of itself, effect a termination.

On the acceleration point -- and this is really where I think Penta and Hancock disagree, is Penta takes the position that the acceleration notice terminated the lease. The limited discovery we need relates to the actions of Wilmington Trust as owner trustee after the foreclosure sale during this period that Hancock owned the plane and was selling it to an unrelated third party; where Northwest, as the debtors, and Wilmington

Trust, as the owner trustee, continued to take the position that the lease was in effect. And so while the bills of sale, when Hancock owned the plane and when the plane was subsequently sold, were out there, they were continuing to make written representations and take in writing the view that the lease was in effect, which I think undercuts significantly, if not completely, the argument that somehow the lease terminated in January. Those were admissions by both the debtors and by the owner trustee.

I think, in terms of how we get to the finish line, the process that the Court outlined makes sense. Hancock, Milbank, me, have no interest in working up legal fees for the sake of working up legal fees; it's one of the reasons that we didn't proceed with discovery while we were having conversations and trying to work through the accounting and bill of sale issues between the last hearing and now.

And I think it makes sense for Penta, Wilmington Trust, and Hancock to sit down in an orderly way and say, this is what we agree on, this is what we can stipulate. And there are documents that have not been exchanged among the parties that we can exchange at this point. And without getting into document demands and depositions, which I agree are expensive, and I don't think we need at this point, we may be able to package up the case and give the Court a final submission. And we'll know, once we go through that exercise, whether we need

another hearing or not. It may well be that we're able to give the Court, these are the stipulated facts, and here's our arguments on the law, and the Court would be able to decide it on the papers. I think that that could happen fairly quickly. I'm not sure what dates the Court has in mind for this.

THE COURT: How long would you suggest for the first stage; i.e., an effort to stipulate as to the facts and determine what is still disputed from a factual perspective?

MR. COHEN: Two weeks? I think we could have that submission in two weeks.

THE COURT: Well, I don't need the submission. I just need you to --

MR. COHEN: Oh, okay.

THE COURT: I need, I think, you to --

MR. COHEN: I think we could do that in two weeks.

THE COURT: All right.

MR. COHEN: During that process, I think by necessity -- and it will be obvious what discovery we would need to complete, if any, and recognizing that there's a holiday in the middle of that, maybe we would have an additional -- three weeks after that point, if there was any discovery, to get that done in three weeks. And so we will be done, really, with this whole exercise, that's five weeks. Give us a week after that to put together papers, I think we could have everything submitted in six weeks.

THE COURT: All right.

MR. COHEN: The marshal downstairs took my Blackberry, which has my calendar, so I don't have the specific --

THE COURT: No, I understand the problem.

MR. COHEN: I don't have the specific dates. But roughly, I think we could do it in fairly short order, Your Honor.

THE COURT: All right. We'll do that then. We'll give a period of two weeks to agree on a stipulation as to facts. Three additional weeks, then, for discovery, one additional week to file a statement -- it can be a brief statement from both sides -- as to the issues remaining and the issues to be decided by the Court.

MR. COHEN: And then responses to each other's submission, if the Court will just take both of those.

THE COURT: If that seems adequate, I'll then take the matter under submission.

MR. MACAULEY: Yeah, if --

THE COURT: If you feel at the end of the process that you need an evidentiary hearing on any material disputed facts, you should let me know, and I'll schedule it. You can call chambers and call Ms. Azzaro, and I'll schedule that hearing.

MR. COHEN: Thank you, Your Honor. I think that makes a lot of sense.

THE COURT: That will do it. And then I'll just take

the matter under submission or -- yeah, very good.

MR. COHEN: Thank you, Your Honor.

THE COURT: So you'll both have an opportunity to put in a brief summary of where you are, what the additional documents and facts show, and in the mean time, you can file a stipulation of confidentiality.

MR. COHEN: Thank you, Your Honor.

THE COURT: All right. Thank you.

All right. I think we're now up to Capp Seville.

MR. MILLER: Excuse me, Your Honor. Stephen Miller on behalf of Wilmington Trust Company. As our matter is concluded, can I sign off now?

THE COURT: Certainly.

MR. MILLER: Thank you, Your Honor.

MR. LEAMON: Your Honor, Mr. Eyers, co-counsel, will be taking it from this point forward, Your Honor.

THE COURT: All right.

MR. EYERS: Thank you, Your Honor. Excuse me. May it please the Court and counsel, Jeff Eyers appearing on behalf of the debtor Northwest Airlines in this matter.

Northwest Airlines is moving for summary judgment, partial summary --

THE COURT: I've read the papers, I've read all of the papers. But I'll be happy to hear your argument, but --

MR. EYERS: Let me move down a page, Your Honor.

THE COURT: You needn't repeat what's in the papers.

MR. EYERS: Certainly, Your Honor.

This dispute arose in 2006, after Northwest filed for bankruptcy petition, when Capp Seville decided to sell the hotel. In April of 2006, Northwest received a letter from Larken stating that Capp Seville and Larken have agreed that the best result will come from a sale of the hotel.

Notably, Your Honor, Capp Seville has never argued that there was any legal justification for terminating the long-term hotel agreements that are at issue in this adversary proceeding. Instead, through this litigation and in their response to our motion, they attempt to deny the agency relationship created by the management agreement; they attempt to distance themselves from Larken, notwithstanding the agreement to sell the hotel; and they attempt to distinguish themselves from the hotel, notwithstanding their own subsequent sale of that very same hotel to La Quinta.

THE COURT: Now I understand that Larken was, in effect, discharged as the manager some two years before it would have -- its contract would have terminated in the ordinary course. Is that right?

MR. EYERS: I believe it was less than two years. But my understanding is, effectively, when Capp sold the hotel, Larken's relationship with Capp was terminated. I've never seen a formal notice of termination of that relationship, Your

Honor.

THE COURT: All right.

MR. EYERS: Approximately one and a half years ago, when this case was first filed, counsel for Capp stood before this Court and represented to this Court that the relationship between Larken and Capp was that of landlord and tenant, a lease relationship. We now know that that's not true. And Larken -- I'm sorry -- Capp has now admitted, as they must, that Larken was an agent of the hotel.

Their response at this point, Your Honor, is, okay, Larken was an agent of the hotel, but not of Capp, and that's simply nonsensical. There was no separate entity. The agreement was between Capp and Larken. Larken was Capp's agent for purposes of the hotel.

The other argument they make with respect to the agreement itself, Your Honor, is that construction is an argument that the limitations language in 5(e) somehow limits the whole agreement, and somehow voids the express grant of agency powers in the separate part of the agreement. And in our brief, we go through the rules of contract construction, and I won't repeat those here.

But I think the best way to illustrate the point that that clause and that limitations language was limited to the service contracts and space leases referenced there, is to look at Exhibit B that's specifically referenced in that paragraph.

And Exhibit B is attached to the original management agreement, I believe it's Exhibit 8 to my declaration. But if you look at that list, it perfectly explains what types of contracts and space leases they're referring to: Telephones, computers, TVs, movie channels, elevators, rubbish, pest control, game machines, airport advertising -- which would be a space lease -- National Check Register, and Telecheck. There is no way to construe the contract as a whole and read into that limitation language an express limitation on Capp's ability -- or Larken's ability to bind Capp that would void the entire agreement and frustrate the purpose of the agreement.

THE COURT: Now you're discussing or arguing what the lawyers would call "actual authority."

MR. EYERS: I am, Your Honor.

THE COURT: You also, at least in your initial papers, refer to apparent authority. Do you proceed on apparent authority or just on actual authority for purposes of the motions before the Court?

MR. EYERS: For purposes of the motion before the Court, I'm only going to discuss actual authority, Your Honor.

THE COURT: All right. That, I suppose, simplifies things by some period of time. Although judging by the papers I have before me, that may be a forlorn hope.

MR. EYERS: Your Honor, I think the volume of those papers reflects one single argument on the part of Capp

Seville. Capp Seville actually suggests to this Court that Minnesota law is unique. It must be the only state in the United States that somehow allows extrinsic evidence -- a court to consider extrinsic evidence in the construction of an unambiguous contract, and that's simply not the case, Your Honor.

THE COURT: Well, they say I should consider the course of dealings --

MR. EYERS: Well --

THE COURT: -- between the parties.

MR. EYERS: And we've cited cases in our brief, Your Honor, that make it clear that that's not the case. I'd like to talk a minute about the cases and the manner in which Capp cites Minnesota law.

We cite the Blattner case for the noncontroversial proposition that extrinsic evidence is not admissible to construe an unambiguous contract. In their brief, they say:

> "Northwest mis-cites Blattner as stating that extrinsic evidence is only relevant if there is ambiguity in the contract. Rather, Minnesota law holds that the parties' conduct and course of dealing is generally relevant."

What Davis actually says, Your Honor, is:

> "Only if the contract is ambiguous will the Court consider extrinsic evidence to aid in construction."

In their reply brief, they selectively quote from the cases and leave out the beginning phrase, which says:

"When there is ambiguity or a contract is reasonably susceptible to multiple meanings."

There are no cases cited, and I'm not aware of any cases involving Minnesota law, Your Honor, that says that extrinsic evidence is admissible to construe an unambiguous contract. In connection with this issue -- and, Your Honor, that really goes to the volumes of paper you discussed.

Once that issue is decided, all of that evidence, all of that self-serving testimony becomes irrelevant, and the Court --

THE COURT: Well, does it, in this sense? If a disclosed principal gave certain authority to its agent --

MR. EYERS: "A disclosed," Your Honor?

THE COURT: Yeah, a disclosed principal gave certain authority to the agent, and gave authority to do exactly what was at issue in a written agreement, but the third party dealing with the agent knew that that authority had somehow been modified or had been limited for whatever reason. Would the third party have the right to rely on the written grant of actual authority, you know, with knowledge of the fact that that authority had been limited?

MR. EYERS: Your Honor, I think the answer is no, but for a different reason than you're suggesting. I think if

actual authority is limited, then there is a limit on actual authority; and, by virtue of that limit, there is no authority to do whatever is beyond those limits. It's not a question of whether or not the third party knew of those limits or could rely on an earlier agreement. You simply create a scenario where the actual authority has been limited.

THE COURT: All right.

MR. EYERS: With respect to extrinsic evidence, Your Honor, in their reply brief Capp also raised one new issue that I'd like to address briefly, and that is the suggestion that the stranger exception to the parol evidence rule applies here, and that because Northwest Airlines is not a party to the contract, the parol evidence rule does not apply. And that's simply incorrect.

We haven't gotten the chance to address this, Your Honor, but there are a long line of cases in Minnesota law explaining that where, as here, the third party is making claims or asserting rights based on the contract at issue, the parol evidence rule does apply, and the parties -- neither party is allowed to offer extrinsic evidence in support of a different construction.

Your Honor, I've got those cases cited in a letter to the Court, or I can read them into the record, but we didn't have a chance to respond to that issue. And we certainly wanted to make the Court aware of the fact that there is

evidence explaining, in this situation, the parol evidence rule does apply.

THE COURT: All right. You can put that letter in the record.

MR. EYERS: Thank you, Your Honor.

If we turn to the hotel agreements themselves, agreements that were executed by Larken officers on behalf of and as agents of the hotel -- excuse me -- the issue, as a matter of law, becomes clear that Larken was executing those contracts on behalf of its principal Capp.

Now Capp's response to this is to suggest, as with the management agreement, that there's some distinction between the owner and the hotel with respect to the hotel agreements, and that's simply not the case, Your Honor. And what we point out in our brief is that the only references to the hotel owner and the hotel agreements themselves are these parentheticals in one paragraph, which refers to a contingent situation, where the hotel owners is not a party to the agreement.

Those agreements do not, as Capp suggests, separately define "owner" from "hotel," thereby compelling a conclusion that they're different entities. To the contrary, they carve out a small exception for those situations where the hotel is not the owner. And then the signature block that Capp keeps referring to also makes it clear that that signature block is not a block where the owner signs on as a party. It's a "I

hereby consent to these terms" type of signature block, which is consistent with the language of the agreement. It's those situations where the owner is not a party to the agreement, where the owner is nonetheless asked to sign on to the agreement because it includes those terms about running with the land.

One small issue here, Your Honor. Capp raises this issue over and over in its brief. I have made clear to Capp's counsel that Northwest is not claiming those agreements run with the land. I don't know why we talk about that in the briefs. I made it clear to their counsel that's no longer an issue. They're right, we did not register the agreements as you have to under Torrents Property (phonetic). We don't need to prove that they run with the land in order to prove out claim, but that is not an issue in this case, and I'm not sure why we spent so much time talking about it in the briefs.

The only other issue with respect to the hotel agreements themselves, Your Honor, is this notion -- in our briefs we made it clear that because Capp admits that Larken was an agent for the hotel, and because Capp admits that Larken had no property interest in the hotel, Larken could not, as a matter of law, have executed those agreements in any other capacity other than as a managing agent for Capp with respect to the hotel.

And in their reply brief, Capp suggests for the first

time -- and they cite this case, Lee, involving University of Minnesota, for the notion that a party without an interest in the land can nonetheless grant a license. And again, Your Honor, that's simply not what that case says. The license in that case came from the owner of the land, the University of Minnesota, and it simply does not support the proposition for which Capp cites it.

Based on the admissions in the record, Your Honor: The admission that Larken was an agent for the hotel; the admission that Larken was authorized pursuant to the terms of the hotel agreement to rent rooms and provide hotel accommodations; the admission that, based on the language of the hotel agreements, the entity signing them was an agent for the hotel, Capp's liability is established as a matter of law.

Your Honor, there are cross-motions. I would like to spend two minutes briefly discussing Capp's motion. It's not based on the agreements themselves; it involves a mish-mash of facts. In order to deny that motion, I think the Court need only look at the written agreements themselves. It need only look at Capp's own self-contradictory testimony about its relation with Capp and whether or not Capp and Larken had to approve various drafts of the agreement.

To deny that motion, the Court need only recognize that we've got alternative bases for recovery, including ratification, including apparent authority, including the

agency relationship that existed as a matter of fact outside the terms of the agreements. It's not a summary judgment motion, it wasn't properly brought for a proper purpose, and it should be summarily denied, Your Honor.

THE COURT: Now just tell me about Exhibit I to your declaration.

MR. EYERS: Is that the hotel -- is that the hotel agreement?

THE COURT: That's the HSA, the hotel services agreement.

MR. EYERS: And there were two of them, Your Honor.

THE COURT: It's the first one --

MR. EYERS: Okay. That's fine.

THE COURT: -- dated August 21, for pilots, I believe, or crew. And the signature page shows that it's signed by Andrew Roberts on behalf of Northwest Airlines, Brad Cook on behalf of the Clarion Hotel. Then there's a line for signature, "(Hotel Owner)" that's blank. There's a date in there, August 11, 2004. And then there's a circle. And your copy, you gave it to me, nobody tells me anything about this copy. A circle. And the word -- around the unsigned "hotel owner" signature block, the word "remove" is there, and then on the left I see "Tom" -- the name "Tom Brandt", a phone number, and title, "Manager for NW Hotel Group."

Now does the record give me any evidence whatsoever as

to what those words "remove" and "Tom Brandt" mean, or shall I just ignore those?

MR. EYERS: I'll tell you what I know, and I'll tell you what the lawyers know. Brad Cook testified that he wrote in the date, that 11 August, 2004, so that's his writing. The Bates --

THE COURT: All right.

MR. EYERS: The Bates Numbers at the bottom of this agreement reflect the fact that this copy of the agreement came from Larken's own files. I believe, Your Honor, that this is the only copy of this agreement that includes this mysterious circle and the word "remove." It wasn't in our files, it wasn't -- I don't believe it was in Capp's files. And I believe that just about every witness that ever touched these agreements has been asked about that word -- that circle and the word "remove," and no one is taking credit for it.

THE COURT: And what is the "Tom Brandt" -- how did that get on this copy, do you know?

MR. EYERS: Your Honor, my recollection is -- and I'm not positive about this -- is that a Larken employee testified that she received that name as a contact person for Northwest Airlines -- that is -- Tom Brandt is a Northwest employee, and that's a Northwest Airlines phone number -- and that someone received Mr. Brandt's name as a contact person or a source for information and wrote that on there. I believe it was an

administrative assistant at Larken, but I'm not positive, Your Honor.

THE COURT: All right. And there are other copies of this document that show the two signature lines filled in, that show Roberts and Cook's signatures --

MR. EYERS: Yes, sir.

THE COURT: -- and that don't have the "remove" circle.

MR. EYERS: Correct, and that don't have the "Tom Brandt." I don't think Tom Brandt is --

THE COURT: That's not material -- somebody --

MR. EYERS: That writing doesn't seem --

THE COURT: Somebody scribbled that because it was a blank piece of paper, we assume.

MR. EYERS: Yes, sir.

THE COURT: And I see Exhibit J, which is the other HSA, doesn't have anything about "remove" on it; it just has a blank undated signature line.

MR. EYERS: I believe that's correct.

THE COURT: Okay.

MR. EYERS: And the only thing I'd point out with respect to the signature block again, Your Honor, is the nature of the block for the owner, which is acknowledged and consented to --

THE COURT: Yes.

MR. EYERS: -- and not a block that would bind a party.

THE COURT: All right.

MR. EYERS: I ran through what I had, and I appreciate the Court's time.

THE COURT: Thank you.

MR. GOROFF: Good afternoon, Your Honor. May it please the Court, David Goroff on behalf of Capp Seville. With me today are Daniel Boerigter, who is the general outside counsel for Capp, Dana Rundlof of our New York office. And also as you know, Your Honor, we have Lisa Capp in the courtroom, who is an officer of Capp Seville, and Leonard Horowitz by phone.

Your Honor, what's interesting about Mr. Eyers' discussion is how little he has to say about the hotel service agreements. And there's no dispute that Northwest wants to have the same outcome as against Capp as if it had signed that blank signature line, which it did not, when Capp not only didn't sign, but was never asked to sign, and during the negotiation process given no notice about this document at all. And this makes Northwest's behavior leading up to the hotel service agreements nonsensical.

Now Northwest has told you that they're going to have a response about parol evidence. That's news to us. They haven't shared this letter they intend to produce to you, and I

would hope Your Honor would give us time to file a similar letter in response.

THE COURT: Oh, I assume you'll file a twenty-page letter in response if history carries through. I won't stop you from doing it, if you want to do that, but I would hope that maybe you could be brief.

MR. GOROFF: Well, Your Honor, we do cite a Minnesota case, though, State v. Russ --

THE COURT: Don't tell me about it. If you're going to tell me about it in your response, you can tell me about it then.

MR. GOROFF: Well, I have that case already before you, Your Honor.

THE COURT: All right.

MR. GOROFF: And that case says that the parol evidence rule does not apply as to third parties who would challenge the meaning of a contract. It's a 1959 Minnesota case.

We also, of course, cite the Zenith Radio Corp v. Hazleltine case on that point.

And there's also a series of cases that say Your Honor is entitled to look at the context of an agreement, what the parties were thinking, what their prior behavior -- we cite the Ecolab case from Minnesota and the ICC case from Minnesota.

And those things Northwest does not want you to look

at. They don't want you to look at a long brief, and they don't want you to look at exhibits, Your Honor, because it shows their claim is entirely factually and legally false.

Northwest, for many years, has had a specialized hotel department, and it has lawyers in that department who draft a template that Northwest insists on using with each hotel service agreement. And that template, not only during the period in question, but for many years before that, always had a separate signature line for the owner; it always separately used the terms "hotel" and "owner;" and it always had, in the relevant time period, this Paragraph 12: The run with the land provision, which says, refers to "the owner, if not a party hereto."

Now if the owner were always bound and the owner always a party by virtue of the manager's signature, that would be a nonsensical clause. That is why Mr. Eyers doesn't want to talk about running with the land, and he doesn't want you to look at that particular paragraph. But lo and behold, that paragraph is in Exhibit I and it's in Exhibit J, and it's revealing, under Minnesota law, as to what things meant.

He also cites the Blattner case. That's a case where parties are disputing their own agreement.

If you put yourself in Northwest's position, why does it have that template, and why does it keep having it as it revises other things over the years? Why does Northwest, in at

least twenty predecessor agreements, go to the trouble of obtaining an owner's signature, even though it didn't go to that trouble here? That includes, Your Honor, the Holiday Inn agreement which directly preceded Northwest's agreement with Larken for the Clarion Hotel. Again, they want their choice, both to put the signature block in and to leave it unsigned, to have absolutely no legal consequence as to them.

Now in urging this position, Northwest ignores a broad swath of Minnesota law, which Your Honor knows controls, and they ignore it in their reply. And that includes the Quintin case, the Kenneally case, and others, which have long held that if you have a separate signature line, and you don't get that party's signature, you don't have a claim against that party.

And in the Kenneally case, it's significant because there a secretary of a corporation was supposed to sign. The president did. But because the secretary didn't, there were no rights against the corporation itself.

They also ignore the Fourth Circuit Matter of Campbell case, where an auctioneer had a signature by one of its parties, but not in the official capacity; and, therefore, the auctioning firm was not held to be bound. They totally ignore that authority, although it controls and requires summary judgment for Capp.

They also ignore the general proposition that if you choose to use two separate terms in close proximity to one

another -- "hotel, owner" -- they can be presumed to have different meaning. And that's the Elveth Taconite case.

They also ignore the Minnesota law that says every term you choose to put in a contract is presumed to have meaning. Lawyers don't have wasteful, nonsensical clauses. That's the --

THE COURT: They don't?

MR. GOROFF: Well, that's the Minnesota law, Your Honor, that's the Brookfield case.

THE COURT: Well, maybe Minnesota presumes that, but I don't think you really want to convince me that lawyers don't have wasteful, duplicative clauses in contracts, in briefs, or in other legal submissions.

MR. GOROFF: Well, they've never said it was a wasteful, duplicative clause.

THE COURT: No, I understand the principle of contract construction that you're arguing.

MR. GOROFF: And it's all --

THE COURT: We actually have that here in New York, too.

MR. GOROFF: Uh-huh. Well, there are places where Minnesota law is a little bit different than New York, such as on the duty of inquiry.

THE COURT: I have no doubt, and at least the parties do appear to have agreed on this, and that is that Minnesota

law controls.

MR. GOROFF: And they -- again, another principle of Minnesota law that Northwest doesn't address and doesn't ask you to look at is the principle of contra proferentum. They drafted this, it comes from their template.

Natalie Goldston, whose name you've probably seen a lot in the papers, who is --

THE COURT: I certainly have. But keep in mind that, as you get into the fine points and the details here, I don't know that you're supporting your motion -- your cross-motion for summary judgment. You may be opposing their motion for summary judgment, but you've got to show me that you're entitled to summary judgment on these papers, and that a trial isn't necessary as to exactly what Ms. Goldston did or didn't do, particularly with regard -- was she a party to the alleged colloquy that we don't need to show this to Capp?

MR. GOROFF: Yes, she was.

THE COURT: All right. That's an interesting colloquy, but I don't know that it helps --

MR. GOROFF: It's undisputed, Your Honor.

THE COURT: -- my job, in terms of a motion for summary judgment on your part.

MR. GOROFF: Well, I'll explain why it does, Your Honor.

But what we have here are established principles that

"hotel" had to mean something other than owner -- that's undisputed under the Elveth case -- that the blank signature line meant Capp can be bound -- and that's Kenneally and Quintin and Matter of Campbell -- and that the signature line had to mean something -- that's Brookfield. Your Honor, those propositions require summary judgment for Capp.

But there is, unfortunately for the time, a lot more. The undisputed facts show that Northwest had absolutely no reason to assume that the manager would be binding the owner by its signature. First of all, there is nowhere in the hotel agreement that it says that. Read the HSAs. There's nothing about the manager's signature binding the owner.

And if you look at the admissions by the people in Northwest's department -- Shapiro, Brandt, Kix (phonetic), Hass -- they all say they expected the manager to sign. They also admit that they knew that managers and owners had all sorts of different ownership relationship; and thus, there was no basis to presume that owners always empowered managers to sign. And it's simply not true here.

If Northwest wanted that, it never said in its request for a proposal, it never said so during the negotiations for the HSAs, at any time. This is undisputed, Your Honor. It never said so in the documents. They never talked to Capp. They never asked Larken about its authority to bind Capp. The silence and inaction on Northwest's part is truly unbelievable,

if they want to come here and then bind Capp to a contract.

And again, Northwest ignores the Geldermann case, the LaSociete Generale case and others we cited in the opening brief, which says it's not for Your Honor to reform the contract and correct Northwest's due diligence errors. They had an opportunity, an obligation if they wanted to bind Capp, to do the due diligence.

But it actually goes beyond this, and this is a point Your Honor touched on. Northwest had actual knowledge that Larken was exceeding any power it had as to Capp. It's undisputed that Ms. Goldston and, on separate occasions Mr. Cook, each told Northwest that the term that they wanted, the duration term of five years, was two years beyond the contract they had with Capp. That takes this out of any argument of actual agency.

THE COURT: Well, or is that an issue for damages, as they say it is?

MR. GOROFF: No --

THE COURT: They say that -- would you let me finish my question before you tell me I'm wrong?

MR. GOROFF: I will, Your Honor.

THE COURT: Thank you.

They say that they can still get damages up until the period of time that the Larken agency would have concluded; maybe not the full period beyond that, which would have been

affected by the scope of Larken's authority, arguably, but that they can at least get damages from the date of sale, when you used the circumstances to "kick them out" -- their words, or your broker's word -- and the period of time, which I think was December 31st, 2006, this year, that the Larken contract would have concluded if it had not been concluded earlier.

MR. GOROFF: If it had not been breached --

THE COURT: Terminated earlier.

MR. GOROFF: -- and terminated, correct, Your Honor.

Now Your Honor says -- I hope -- I'll wait before correcting you. I hope Your Honor -- that's Northwest's argument, and I will address it. I hope Your Honor has not accepted that argument because that argument is based on Section 605 of the restatement section of agency. And as we explained in our reply, there's three elements that are required to make that test, none of which Northwest satisfies.

First, that principle applies when you have widgets. You made a contract of amount, 100, and you got 120. It doesn't apply when you're talking about a matter of years, and they have no case to the contrary.

Second, in order to fall within Section 605, they would have had to put Capp on notice of their intended construction. And of course, there was no communication at any time from Northwest's side to Capp.

And third, Capp would have had to have taken no steps

to its detriment, believing it wasn't bound, which of course Capp did because Capp asserted its rights to terminate Larken for its nonperformance and move on to sell the hotel, which it had the right to do.

Again, so that is the answer as to why that principle doesn't apply. You don't get to go and make an agreement with an agent that says, I'm beyond my authority, and say, great, let's make that agreement anyway, and then we'll blue-pencil it down; that's not how the law works, and that's not how Section 605 [sic].

Everything -- and of course, again, there's a duty of inquiry under Minnesota law, not only as to apparent authority, but as to every party that deals with an agent, and that is the Lee case we cite, Your Honor. And they have no case to the contrary.

And they were, in particular, put on a duty of inquiry, not only because they were told that the duration of the contract exceeded theirs, but because Jim Hass, Northwest's signer, knew the terms here didn't make sense. He didn't see how Larken could be making a profit and could deliver what it promised. And when you're put on notice like that, you all the more have a duty of inquiry, which was not followed.

Now Mr. Eyers, in his world, is extremely simple. He points to you Exhibit B, which I strongly hope Your Honor reads, because Exhibit B --

THE COURT: I certainly would have had more luck reading your exhibits if you had bothered in your brief even to tell me where they were, and to key them into something usable. But I spent the time to figure them out, so, yes, I have read some of your exhibits, at least the ones, as I went through your mounds of paper, that seemed to me to be material to your case.

MR. GOROFF: Well, Your Honor, this is --

THE COURT: So tell me what I should have read now.

MR. GOROFF: This is Mr. Eyers' exhibit, Your Honor.

THE COURT: All right. Yes, I know. You relied on his.

MR. GOROFF: And we tried --

THE COURT: And you had some unstated group of letters and numbers that keyed -- what number are you -- I have Mr. Eyers' exhibits, I believe, at least his first set, in front of me.

MR. GOROFF: Well, Your Honor, we -- and I apologize if it was inconsistent. We tried to follow the same format that Northwest did. If there was confusion, I do apologize about that. I do think we gave a key.

THE COURT: All right. Now tell me what I should have read. Let's get to the --

MR. GOROFF: Okay. The restated management agreement. And that begins by defining Capp Seville as the owner; that's

on the first page of the exhibit. It separately in definitions defines the "hotel;" separate term. And the "hotel" is defined as "the hotel that is operated on the property." And the "property" and the "land" are also separately defined. The "property" is defined as "the land, the improvements, and the personal property."

And the only thing for which Larken is given an agency is for the hotel. There is nothing in this agreement that gives Larken any right to act for the land, to act for the property, or to act for the owner. And even as to the hotel, Your Honor, the grant of power, which comes in Section 2, which is at Capp-43, Page 5, specifies that the grant of agency is subject to the terms of the agreements.

Now if you go into Exhibit -- excuse me -- the manager's obligations, one of the obligations is for them to rent property and is to -- let me read this, it's at Capp 50. It is as an obligation, because they're going to have to pay monies back to Capp:

"-- to operate the hotel, which includes, without limitation, the rental of rooms, the operation of the kitchen and bar, the operation of the" --

THE COURT: What page are you on?

MR. GOROFF: Capp-50, Page 12 of the agreement, Your Honor.

THE COURT: All right.

MR. GOROFF: And this is something that Mr. Eyers didn't touch on here, but I suspect he will in his reply, which they want to transpose without limitation; so that, instead of being a non-exhaustive list of what the obligations are in operating the hotel, which is all that this is about, that it becomes a list to rent rooms without any limitation on that right to rent rooms, and that's simply not what it says.

The agreement with Northwest, I think we can all agree, is a contract. Well, contract and leases are addressed in Section 5(e), and that's at Capp-53, Page 15. And this is one that Mr. Eyers spends a huge amount of time on, but he doesn't read properly. Now he commends exhibit --

THE COURT: I understand this argument of yours, the including language.

MR. GOROFF: Right. And you note it's contracts and leases broadly, it defines "Contracts" and "Leases" -- capital C, Capital L -- but then refers to "service contracts and other contracts and leases," meaning those other contracts and leases are not limited to service contracts, nor are they limited to the defined terms. That's the only natural reading.

Mr. Eyers says, well, look at Exhibit B. Exhibit B was telephone, utility, and this. Exhibit B were those contracts that were in place prior to Larken taking over. Larken was the first manager of this hotel, so you didn't have prior -- or you didn't have prior hotel service agreements, you

had no prior agreement with Northwest, you had no prior management agreement. That is why the contracts in Exhibit B are as limited as they are.

And if you read through Exhibit 5, it makes clear that Larken may not bind Capp without Capp's authorization, which indisputably was never obtained here. And it further provides, Your Honor, that Larken may not enter into a contract that exceeds the duration of this contract, which Your Honor knows went with all amendments only to December 31, 2007.

So they defaulted, they breached the agreement by entering into a contract. And you can't -- there's nowhere here that says you can blue-pencil that. It was simply a violation of the contract. And it was a violation that was signaled to Northwest by both Mr. Cook and Ms. Goldston. And Northwest did nothing about it, including getting on the phone or sending a letter or sending anyone to talk with Capp.

Now if you look at -- now, Your Honor, I'm talking about course of dealing. If you talk to Mr. Cahill, the President of Larken; Mr. Kruger (phonetic), its controller; Ms. Goldston, the General Manager; Mr. Cook, the Director of Operations at the time, they are of a piece and as a one saying, we had no authority to bind Capp, we didn't believe we were doing so here, we thought we were acting on our own behalf. If you look at the depositions of Mr. Horowitz, Mr. Boerigter, Mr. Van Ornem (phonetic), Ms. Capp, anyone on the

Capp side of the equation, they too say, Larken had no authority to act for us, we didn't know that they were, we didn't think they were, we did not regard ourselves as bound. And Northwest has absolutely no evidence to the contrary. The facts are undisputed.

There was a seventeen-year course of dealing prior to the HSAs under which the parties operated under that belief. Now they don't want you to look at that, again, and I've already told you that Northwest is an outsider to the contract, and can't prevent that in the first place. But also, when we're talking about the terms of agency, there's another exception to the parol evidence rule, and we cite the Lee case, the Dairy Farm case, and other cases at Page 14 of our reply.

And of course, again, Northwest is trying to rely on a document it never asked to see and it never did see. And I ask Your Honor to ponder the question: What if this had been an actual lease? Northwest wouldn't have a leg to stand on. And yet, you know very well that they would have had the same behavior of saying that the manager bound the owner. They're not saying -- they're not arguing here that this was just a pure stroke of luck that they found a document they never asked about, and it happens to support their theory here.

They're arguing -- now they've waived their apparent authority claim for purposes of summary judgment. But they have no actual authority.

Reynolds v. Prudential, a Minnesota case, and the other cases we cited in our opening brief at Page 36 make clear that when you are on notice that an agent has exceeded his authority -- and, Your Honor, any way you look at it, two years beyond is two years beyond authority -- you cannot rely on actual authority.

Number two, they ignore their own Cane case (phonetic) and various other cases we cite, which say that, where the agent itself and the principal itself do not believe that the agent had powers, one should not find an agency. There are cases that they, Northwest, cites where the power was there, but they didn't know that it was the legal effect of an agency. But that's not the case here. Here, you have undisputed evidence that they didn't think they had the power, that they always behaved as though they had the power.

And if you look at correspondence and sort of how the parties viewed this for seventeen years before Northwest, they viewed this as being, in substance, a lease; not legally so because of the circumstances with the Bloomington liquor license, but in substance, that the tenant here or the agent here was to have no more powers to act for the -- you know, the owner, than a tenant would bind a landlord.

THE COURT: I think I understand this argument.

MR. GOROFF: Okay. Also, Capp had no control over how Larken operated the hotel.

THE COURT: I think I understand this branch of your argument.

MR. GOROFF: Okay. There's also the statute of frauds. This is a contract to run with the land. Mr. Eyers says, well, we're not trying to enforce that, but the contract says what the contract says. And if you don't satisfy the Minnesota Statute of Frauds, Your Honor, you don't have a contract. They don't satisfy the Minnesota Statute of Frauds. There is no writing they can point to under which Capp Seville, Inc., gave Larken any authority as to the land. Again, Exhibit B to Mr. Eyers' motion speaks only of the hotel, separately defines "land," gives Larken absolutely no powers as to the land.

They also concede it wasn't registered. Now why is that important? Because part of why Capp brought this case is that they wanted to go after La Quinta, and they threatened La Quinta, and they said they had the right to do so. But if they didn't register, that demonstrates that they knew they had no right to go after La Quinta, and that their action was therefore tortious.

But they say we don't argue that anything we did was justified. That's simply untrue, Your Honor. Larken was in breach. It had not paid us -- "us" being Capp -- $750,000, its manager's or owner's amount -- is obviously a material term. That was admitted by Larken to be a breach of the restated

management agreement. Larken had also failed to make tax payments. That was a further breach of the agreement. So Capp went to Larken and said -- and by the way, Larken also breached by exceeding the duration. Capp confronted Larken on that, and Ms. Goldston said, I'll take care of this, and then didn't. Three material defaults.

So Capp and Larken talk, and Larken says, after 9/11, we're getting out of the hotel business anyway, maybe it's better if we sell this. This is undisputed. And because in part of Larken's breaches -- this is also undisputed -- Capp decides to sell. Capp had no obligations to Northwest, it had no contract with Northwest. It has no obligation to keep on a deadbeat manager, who isn't meeting its obligations because the manager had contracts, any more than a landlord would have to keep a tenant in place because the tenant had a contract with an exterminator or a maid service.

And Mr. Eyers argued this reading -- the University of -- Lee v. University of Minnesota case, which is 672 N.W. 2d 366, that, well, it doesn't make sense because how can you rent rooms unless you are -- you have to be either a lessee or the owner, so they must have been the agent. Not true. A hotel -- to stay in a hotel room for a night, you're not getting a sublease, Your Honor.

THE COURT: I understand. You argue that it's a license and that there was no corresponding obligation to take

rooms, this was simply a rebate, if you will.

MR. GOROFF: Right.

THE COURT: I think I understand. You don't have to quote from the case if the case is --

MR. GOROFF: Well, he accused me of misreading the case, Your Honor. He has misread the case, Your Honor.

THE COURT: All right. Very good. I'll take that into consideration when I study your briefs.

MR. GOROFF: But certainly the behavior of Larken was justification which also precludes any tortious interference claim.

Mr. Karver, who is an employee of a real estate broker, and therefore nothing as to us, said in his deposition that he never told Larken to get rid of Northwest, that Capp never had anything to do with that. Larken testified, and it's undisputed, that it made the decision to get rid of Northwest, that Capp had nothing to do with it. And there's no evidence that Capp had anything to do with it. Capp did decide to get rid of Larken early in its -- before the contract ended because Larken had breached its obligations, as Larken admits.

Northwest made a ratification argument in its reply. That argument had never been made before, and therefore is waived. There's also no ratification -- obviously, Capp at all times instructed Larken that it had gone beyond its authority, told Larken they should tell Northwest it had no rights as to

Capp, and was assured by Larken it would.

There's never been any acceptance of benefits, that Capp got rent or monies from Northwest's contract, is true of anyone who stays at the hotel. If, passenger in Minneapolis, Your Honor, you had stayed at the Clarion Hotel and had paid Larken money, Capp would have gotten a percentage of that. But that didn't make Capp a contract party as to you or anyone else that stayed there, even someone that stayed there often, such as Northwest.

And if Northwest believed that it was a counter-party to a contract with Capp, then why isn't Capp on the schedules, Your Honor? Those schedules were prepared before this litigation, and Capp is nowhere there, and that's never been answered.

Now let me just conclude by saying that there is a party in absence here, and that is Larken. Larken was the party that dealt with Northwest. Larken was the party that promised Northwest. Larken is the party that signed the agreement. Why aren't they suing Larken? Well, they did. But they've come before you and they've said, well, we know Larken is judgment-proof, they don't have the money. But as part of the deal to get this sale done, they know Capp put aside an escrow amount, so they know that's money that's there to be contested for, and they want that money.

Your Honor, as a matter of law, as I think we've shown

overwhelmingly -- and I do apologize if Your Honor thinks the papers are long, but I think we needed to show all of the evidence that supports our position -- Northwest has absolutely no claim against us; and, as a matter of summary judgment, Your Honor can only find for Capp Seville. Thank you.

THE COURT: What do you know about the document which you cite, also -- you refer to their version of Exhibit I, which has this writing on it, "remove."

MR. GOROFF: Well, Your Honor, we were pursuing the thought that this was evidence that they were trying to kind of hide things, and Mr. Brandt in his deposition didn't know where that came from; no one from the Larken side knew where that came from.

Your Honor, I think as Mr. Eyers says, we all could have put in additional copies of that, that didn't have that "remove" sign. We chose not to because tried not to overflow the volume of paper, and because we tried to work as much as possible within Mr. Eyers' exhibits. But I agree with him that I don't think it's of material significance to this summary judgment motion. And if for some reason Your Honor were to rely on it, I don't think we'd have anyone at either side at trial who could address it. Certainly it had nothing to do with Capp.

THE COURT: No, that I understand. He says, though, that Capp wasn't a proposed party here; it was just

acknowledged -- to be acknowledged and consented to by the hotel owner.

MR. GOROFF: Well, that puts it on the hook, and that's what happened in twenty instances where they had people acknowledge and consent that they're bound. And that's why, if you look at Paragraph 12, it says "hotel owner, if not a party hereto." Well "if not a party hereto" suggests that they become a party somehow; they become a party by signing in the owner's signature line.

THE COURT: All right.

MR. GOROFF: Thank you, Your Honor.

THE COURT: Thank you.

MR. EYERS: Can I have five minutes, Your Honor?

THE COURT: Certainly.

MR. EYERS: Your Honor, I don't say this lightly, but Mr. Goroff misrepresents the record when he suggests that Ms. Goldston and Mr. Cook informed Northwest Airlines that the duration of the hotel agreements would exceed their authority. I'm not going to read the deposition testimony into the record. It's on Pages 27 and 28 of our brief, it's set forth verbatim, and it clearly establishes that Mr. Cook has no recollection of any such conversation, and Ms. Goldston testified directly to the contrary.

Mr. Goroff, with respect to the running of the land provision, suggests that our abandonment of that claim is

somehow proof of tortious intent with respect to La Quinta. Actually, Your Honor, under Minnesota law, we could have pursued a claim against La Quinta because they were aware of it before they took possession of the property. We could not have pursued a claim against Capp under that provision, and there is no longer a claim because the property has been sold, and the contracts have never been registered.

Mr. Goroff does raise a good question: If, by virtue of signing on behalf of the hotel, a management company is binding the owner, what's the purpose of this parenthetical language; why do you have this alternative scenario where the owner is not a party? And the answer is really quite simple, Your Honor.

In the hotel world, there are three primary arrangements: There is an owner that manages the hotel itself, there is an owner that hires a management company to manage the hotel as its own agent, and there's a third scenario where the management company actually has a lease at the hotel. And in those cases, the management company could sign on its own behalf because it had a lease. But in that situation, if the contract were to run with the land, we'd need a separate signature with the owner. The signature block is consistent with the language of the agreement and in no way suggests that the owner cannot be the hotel.

Mr. Goroff also referenced some cases he said we're

afraid to talk about with respect to extrinsic evidence. One of those cases was the Ecolab case, Your Honor. And what Capp says is:

"Contrary to Northwest's argument, substantial other Minnesota authority shows that it is appropriate to look at the parties' negotiation history and other evidence of their intent, even though their contract meaning is deemed plain."

That's what they say.

What Ecolab says, Your Honor, is:

"When construing an ambiguous contract, the Court has a duty to give effect to the intent of the parties."

Mr. Goroff also referenced the ICC case. Capp quotes from that case, quote:

"Precontract negotiations may be considered in order to determine the meaning and intent of the parties."

This is the case where they left out what came before that, Your Honor. What ICC actually says is:

"Although preliminary negotiations cannot be allowed to contradict of vary the plain terms of a written agreement, where such contractual terms or words are ambiguous or reasonably susceptible of more than one meaning, precontract negotiations may be considered in order to determine the intent of the parties."

The meaning of that quote changes a little bit when

it's actually fully quoted.

The other case Mr. Goroff cited and suggested that there's a duty of inquiry even in a case with actual authority was the Lee case, Your Honor. And in Lee -- and there's two different Lee cases being cited. It's the Lee cites that he cites with respect to agency. There's no written agreement. So of course the Court looked at evidence of the parties' conduct and extrinsic evidence of the parties' intent when trying to determine if there was a contract, and if there was, what the terms of that contract were.

Finally, with respect to Your Honor's earlier hypothetical: What if the authority really was limited? And in an exchange with Mr. Goroff, the Court pointed out that we contend that any limit really goes to damages and not the actual liability. And I believe Mr. Goroff simply misinterprets the restatement, which says that a contract like this is divisible, whether it's widgets or days or years, Your Honor. Where there are severable units, the contract can be severed.

Northwest did place Capp on notice that it was willing to be bound to the terms of that contract when it received notice that it was being terminated by Capp. Likewise, Your Honor, Capp took no action in reliance on its belief that it wasn't bound because it specifically amended the terms of the sale agreement and entered into the whole stipulation escrowing

the sale proceedings, in order to go through with the sale of the hotel. It can't claim any detriment based on its reliance on its belief that it was not bound to the terms of that agreement.

Therefore, even if there were -- even if there were some factual issue about the scope of Capp's authority, and there certainly isn't any in the written agreement, Your Honor, but even if there were, that would simply go to damages, and Northwest would be potentially limited to the term of the management agreement, rather than the full five years. Thank you, Your Honor.

THE COURT: Now Paragraph 12 of the HSA is the paragraph that has language and the "hotel owner," "if hotel owner is not a party hereto." That's the language that you've been -- you referred to, I think, a moment ago?

MR. EYERS: Yes, Your Honor.

THE COURT: And that opposing counsel has already referred to.

MR. EYERS: Yes, Your Honor.

THE COURT: Is it your position that it was proposed that Capp Seville, the owner, be a party to the agreement in the -- by the signature line that was left for it?

MR. EYERS: I'm not sure I understand the question, but let me try and respond.

I believe that Capp was a party to the agreement by

virtue of the fact that its agent signed on behalf of the hotel. There's no testimony that I'm aware of suggesting that this signature block was specifically left into this agreement to deal with this situation. Instead, the testimony as I understand it is that this is a template, and the reason there's parentheticals speaking about contingencies such as those situations where the owner is not a party is because this is a template and it's designed to deal with a variety of different situations. So I hope that's responsive. But there's no suggestion that that signature block for the owner was specific to this deal.

THE COURT: I understand that, but that's -- the block was still there when the two parties to the agreement signed it.

MR. EYERS: It was, Your Honor.

THE COURT: And they make a big deal of that in their papers.

MR. EYERS: They do, Your Honor.

THE COURT: And you respond to it very sparingly in your papers. But that's just my take on your papers.

MR. EYERS: Sure. Here -- and let me expand, if I might then, because we did summarily address the cases they cite, and the short answer is: Not one of those cases where there was an unsigned signature block dealt with an agent with actual authority. So it begs the question, if they had actual

authority, that's the very reason you have them sign on behalf of the owner. If they don't have authority, then it's a separate issue.

There's no case that I'm aware of that's been cited by either party where a separate signature block on behalf of a principal was found to somehow alter the underlying relationship between the principal and the agent, and I can't imagine any legal basis for that being the case.

THE COURT: Now what do you make of the sentence in the same Paragraph 12 that we've been looking at that says:

"Hotel owner shall provide written notice to Northwest and hotel not later than ten days after it has agreed in writing to sell, convey, transfer, or assign any interest in the hotel facility or this agreement."

What do you make of that sentence? Was Capp Seville bound by that obligation?

MR. EYERS: Yes, sir.

THE COURT: They were.

MR. EYERS: Yes, sir.

THE COURT: So they breached the contract when they failed to provide you -- or did they provide you with notice?

MR. EYERS: Well, we received notice from their agent that they were selling the hotel.

THE COURT: Well, that you learned. But you say they were bound by this sentence separately.

MR. EYERS: Not separately, Your Honor, because it's deemed in the alternative. The previous sentence says:

"Whether or not hotel is in compliance with other terms and conditions of this agreement, hotel shall provide written notices to Northwest."

THE COURT: Yes.

MR. EYERS: So really, that's a redundancy, or in those cases where they truly are separate parties, separate requirements, it doesn't seem to change the meaning of that, which is if the interest on which we are relying to secure these hotel rooms is being transferred, we're entitled to notice.

THE COURT: All right.

MR. EYERS: Thank you.

THE COURT: Thank you.

MR. GOROFF: I just have a couple more things, Your Honor, if I may.

Your Honor, Mr. Eyers a couple of times has said that, you know, these are just there for contingencies, such as if it's a landlord, tenant, or otherwise. Well, what do they do to explore the contingencies here? They did no due diligence, they asked no questions, they did nothing to determine authority.

Second, Your Honor asked if they are trying to treat Capp as a party. Read their amended counterclaim, they most

certainly they are. They've accused us of being a party and of breaching the agreement.

Next, Mr. Eyers begins with a heavy heart telling you that I've misrepresented the record. I don't like that, Your Honor. And, Your Honor, I would encourage you to read Paragraphs 106 to 115 of our statement of facts and the deposition testimony, particularly of Brad Cook and Natalie Goldston quoted therein. You'll see that Mr. Eyers is very selective and extremely incomplete in his citations.

And finally, Your Honor, actual authority is what they're going on. Under no circumstance did Larken have actual authority -- look at the restated management agreement, Your Honor -- to enter into an agreement to 2009. Their arguments about blue-penciling are wrong. But under no circumstances did they have actual authority to do that. They flagged that. Any way you look at it, they flagged that our agreement is 2009 -- is 2007; this is 2009. And what did Northwest do? Nothing. It was on notice. It did nothing to protect its rights. It has absolutely no basis for an agency claim here.

They didn't address the duty of inquiry, which showed that that applies, including with actual authority arguments. Thank you, Your Honor.

THE COURT: Thank you.

I'll take the matter under advisement and get you a decision as soon as I can.

MR. GOROFF: Thank you very much, Your Honor.

THE COURT: Thank you very much for excellent arguments today.

Please go right ahead. Don't wait for me.

COUNSEL: Thank you. Okay. Thank you, Your Honor.

(Counsel confer.)

THE COURT: I'll get an additional letter from the debtor --

(Proceedings concluded at 1:37 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Coleen Rand

______________________________________ October 31, 2007

Coleen Rand, AAERT Cert. No. 341
Certified Court Transcriptionist
Rand Reporting & Transcription, LLC